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ABSTRACT

Pure research in school law is not possible, since the researcher must rely on inquiry that can be verified by experience and observation in the field. The studies produced in the past year tend to fall into the following classes: compliance, accountability, impact, cost-effectiveness, Supreme Court decisions, and the process by which minority law eventually becomes legitimized as majority law in the form of national policy. The studies are widely scattered through the literature, of uncertain quality, tending toward subjectivity at times, accepted on the reputation of the researcher, and ungoverned by a comprehensive categorization scheme. Accordingly, a broader system for categorizing educational legal issues over time is proposed, a workable model called historical-legal research. One dimension is a three-step process by which, for example, a minority viewpoint is transformed into enabling law and becomes national policy, while the other dimension consists of the five major revolutions affecting the schools in the modern era: religious, political, economic, technological, and civil rights. The grid enables researches to plot the progress of any particular legal issue over time from its inception to its general acceptance as "settled, indisputable law." (TE)

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Empirical Research on Education Law Issues: A Model

M. CHESTER NOLTE*

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Riding forth on horseback to round up and brand all the empirical studies attempted during the past year on school law issues would be a mission impossible even with the help of a computerized man-machine system and a crew of fellow researchers. The herd is just too large and scattered and the strays too numerous for that to be accomplished. Lacking modern tools and accomplices, this researcher must beg the indulgence of his readers, and claim no more than a horseback appraisal of those studies as they appeared from the sources examined. An observation made by the eminent American jurist, Learned Hand, in a speech he gave in his eighty-fourth year near the end of a brilliant career.[1] Judge Hand said that even though the odds are against him, man can still win when he loses, if he has done all that he can under the circumstances.

> And if at the end some friendly critic shall pass by and say: "My friend, how good a job do you really think you have made of it all?" we can answer: "I know as well as you that it is not of the highest quality; but I did put into it whatever I had, and that was the game I started out to play."

* The author wishes to express his deep appreciation to Dr. Perry A. Zirkel of Lehigh University, who graciously read the first draft and offered invaluable advice and counsel in the preparation of this chapter.

1. From *A Fanfare for Prometheus*, delivered before the American Jewish Committee, January 29, 1955 at the Hotel Roosevelt, New York City. In THE SPIRIT OF LIBERTY 297 (I. Dillard ed. 1974).

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Everything is being revealed to you on the belief that good research is able to be replicated where the researcher leaves wide tracks that can be followed even though the trail be cold. Just what is the difference between *empirical* and other types of research?[2] Perhaps the best place to start would be with a working definition of *empirical*. So-called "empiricists" not only differ with others but they have a stubborn tendency to differ among themselves. The word *empiricism* signifies heavy reliance on experience. An empiricist[3] is one who trusts in experience and is skeptical of pure research, or methods which, while they may seem theoretically sound, have not been proved in practice.

Empirical research, therefore, is by definition that method of inquiry which holds that observation and experience are the primary means of obtaining knowledge. It is to education and the law what pure research is to science. The basic form of reasoning used by empiricists is *induction*, which draws general conclusions from specific observations. By looking at a particular problem, the researcher hopes to induce a general principle from the observable data. Inasmuch as attempts to quantify phenomena in educational law are extremely difficult, and because honorable researchers often differ on what certain data mean, empirical research leaves much to be desired. The range is broad, all the way from biased pronouncements of the grossly misinformed all the way to highly dependable statements originating with those who have gone to considerable lengths to test their expectations in the field.[4] What emerges is a pattern of research that requires the consumer to weigh not only the veracity of the findings per se, but also the qualifications of the researcher as well. Research by a non-expert in school law is widely discounted, while even a subjective pronoucement by a recognized authority may be acceptable.[5] Consumers of empirical findings must be aware that the results of this research lacks dependability in predicting outcomes whether done by an amateur or an expert.

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2. *E.g.*, historical, philosophical, statistical, normative-survey, and the like. *See generally* G. SAX, EMPIRICAL FOUNDATIONS OF EDUCATIONAL RESEARCH 119 (1968).

3. According to the *Encyclopedia Britannica* in Volume eight at page 347, while empiricism was not unknown on the European continent, it was the dominant trend in Great Britain. The phrase "British empiricists" is commonly used to refer to Locke, Berkeley, Hume and their lesser followers, whose unmistakable influence on first British and later American jurisprudence cannot be taken lightly.

4. *See* G. SAX, *supra* at note 2. The author maintains that "education will not be regarded as a profession until its practitioners have mastered these (pure research) skills." Apparently others have had similar doubts about educational research, indicating that in a very real sense, empirical research is almost the only type of research open to those in educational law.

5. This researcher pleads no immunity to this charge. Since "expert" witnesses may express opinions in courts of law, while others may not, empirical findings are increasingly being introduced there even though there is some question as to their verifiability in fact or efficacy as predictive instrumentalities.

Before concluding that empirical research related to law and education is unreliable and should be scrapped, consider what life would be like without it. In the nature of things, decisions must be made, schools must open, textbooks must be procured, teachers and other employees hired, and reports made. There is no waiting for the final results of any research because the business of education must go on. Judges are called upon to decide educational issues. Although they are showing a growing reluctance to do this, perhaps because the research gives them little predictability of the consequences, there seems to be no other way than judicial activism to resolve an educational problem unless local officials show an inclination to solve local problems locally. There may be an improvement with the way legislatures are beginning to cope, witness the recent legislation on higher standards for both teachers and students. The wonder is that with such a lack of predictability, schools are doing as well as they are. The air of optimism that has permeated educational thinking throughout our nation's history still is alive and well and quite apparent in the literature.

Just so long as the conclusions reached in empirical research are not considered as final and/or immutable, they serve a useful purpose to decisionmakers mainly because they represent an interchange between others with similar problems. Reading between the lines, there is always the implicit warning that what we have here is subject to later developments, so do not be too sure that any decision you will make can be considered an end to it all.

The object decisionmakers must focus on, therefore, is a moving target. Is it a slow-moving moose, or a speeding beer truck? In some instances where the law and education come into contact, it is one, sometimes the other. The problem is to find which is which and adjust the sights accordingly.

Studies in education follow the general methodological pattern of science. A problem is posed, data are collected, a hypothesis is posed and tested, and conclusions are drawn.[6] Systems analysis merely added steps to this process leaving as before an open-ended process that permits return to the beginning for a new start in each instance.[7] This gives rise to the tacit admission that if at first we don't succeed, we may try, try again until it works.

This tendency toward pragmatism is a product of the school of thought headed by William James and C. S. Peirce. James wrote that a

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6. Often modified into the so-called normative-survey method.

7. Determination of need, definition of objectives, identification of constraints, generation of alternatives, analysis and selection of one alternative, development of pilot implementation, evaluation and feedback comprise the eight step process.

belief or theory is true if it "works" or if it "pays."[8] James' theories were popularized early in this century through his writings and teaching. Unfortunately, his later differences with Peirce (1839-1914)[9] caused pragmatism to be subjected to scathing criticism from philosophers of both the realist and idealist schools. Despite its low rating, however, many studies examined for this chapter were of the "if-it-works, it's-good" school of research.[10]

Pragmatism is apparent in the modern saying, "You cannot argue with success." No doubt, educational decision-makers borrow heavily from business officials, whose "bottom line" theory that if a company is making money, it must be doing something right, leading to the rule of thumb that if it's not broke, don't fix it.[11]

Observation on methodology based on experience gained in doctoral research studies of school law suggests a workable method called ***historical-legal research***. This approach uses a time line, broken down into past, the present, and the future. When applied to a problem in educational law, such as the legal responsibility of parents for the vandalism of their offspring, the problem is first examined as it developed in the past. The current status of the law (legislation, case law) is then examined, leading to a discussion of possible developments in the future. Thus, the researcher using this method draws together in one study the other findings on the problem, the law relating to its solution, and discusses possible trends toward its resolution. In a large sense, most of the articles reviewed for this chapter were in effect the study of a particular legal problem and followed this method in its analysis.[12]

A communication system is in place which apparently is subscribed to by those who write educational law articles or publish reports concerning the legal aspects of education. One evidence of this interchange of ideas is the fact that there is surprisingly little duplication of research, leading to the conclusion that prospective legal reseachers know what has been already researched and do not plunge in where the field has been preempted by earlier studies. Further evidence of the system exists where the names of writes and researchers are noted more than others. Evidently, some prolific writers spend a lot of time in pursuing legal

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8. W. JAMES, DICTIONARY OF PILOSOPHY AND PSYCHOLOGY (J. M. Baldwin, 1902).

9. *See generally* 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 464 (C. Hartshorne & P. Weiss eds. 1935).

10. The cost-benefit studies are a prime example.

11. Only one step removed from Luten's observation that it's not so hard to lift yourself by your bootstraps once you're off the ground. *See generally* P. DICKSON, THE OFFICIAL RULES (1978).

12. An example of a doctoral study along these lines is M. Severino, School Vandalism: Legal Implications (University of Denver, unpublished doctoral diss. 1971); in NOLPE's EMERGING PROBLEMS IN SCHOOL LAW (NOLPE 1971).

research while others spend occasional time on this pursuit. Finally, the studies are heavily weighted in favor of assessments of compliance with selected United States Supreme Court decisions or with the question of their impact on educational decisionmaking in general. Many of the articles written in the past year consist of case comments on a particular leading case with consequential implications for the educational practitioner.[13]

A MODEL FOR SOCIAL CHANGE

The dynamic problem of how the law changes over time is involved in either a compliance or impact framework. The model by which this change takes place is now well-settled, a by-product of the civil rights movement. First, a minority individual or class of deprived individuals challenges its treatment in court and wins. Second, a period of time elapses during which the decision is being enforced and new adjustments made in the treatment of the minority individual or class. Finally, over time, the new value is accepted by the majority and enacted into law through majoritarian legislation by the Congress or the various legislatures, becoming in effect official governmental policy on a national scale.[14] Such legal civil rights issues as desegregation of the schools, use of public moneys for private and parochial schools, and the legality of Bible reading and prayers in schools are examples of the maturation process by which a minority point of view in time becomes legitimized and finally emerges as official national policy.

Ordinarily, the time consumed in going from step one to step three is a decade, the time that elapsed between *Brown v. Board of Education*[15] in 1954 and the passage of the Civil Rights Act of 1964.[16] However, time necessary for full compliance must vary with each issue. For example, the process was shortened considerably on the question of whether a school district could legally bar educably mentally retarded children because there was no program designed to meet their needs.[17]

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13. Compliance studies purport to measure the extent to which decisionmakers are in accord with the opinions of the court or statutory enactment, whereas the so-called "impact" studies assess the effects of such case law or legislation on educational practice in general. *See, e.g.*, H. Lufler, *Unintended Impact of Supreme Court School Discipline Decisions*, in CONTEMPORARY LEGAL ISSUES IN EDUCATION 102-105 (McGhehey/NOLPE 1979).

14. M. NOLTE, HOW TO SURVIVE IN TEACHING: THE LEGAL DIMENSION, 19 (1980).

15. 347 U.S. 483 (1954).

16. 42 U.S.C. § 1971 2000a (1964), 42 U.S.C. § 1975(a) (1964), 28 U.S.C. § 1447 (1964).

17. Only three years elapsed between Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pa., 343 F. Supp. 279 (E.D. Pa. 1972) and the passage of P.L. 94-142, the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 (1975), a much shorter legitimization period than for the earlier desegregation issue.

Judging how long a particular issue will consume before it runs its course is difficult if not impossible. The issue of school desegregation is still in the process.[18] Sociological researchers tend to speculate that at least one generation must pass before far-reaching changes can come in any society. Since desegregation as an issue is thirty years old next year, this estimate may be an underestimation.

CURRENT REPORTING ON SCHOOL LAW

If we can accept that time is an element in the process of societal change, the remaining dimension must then become the substantive classification of the issues themselves. What method of classification can be found broad enough to include these educational-legal problems that face decisionmakers today? Reference to written sources gives little enlightenment. For example, *Education Index* lists such challenges under the heading of "Actions and Defenses," while the *NOLPE School Law Reporter* distinguishes cases in higher education from those related to elementary and secondary schools, then categorizes these in turn into categories like tort liability, control of students, negotiations, etc. The *Yearbook of School Law* spotlights affected groups, such as employees, students, and school boards. A more detailed system of classification is employed by *West's Education Law Reporter*[19] while the Educational Resources Information Center (ERIC) makes use of a thesaurus.

Several sources such as the *NASSP Bulletin* and the *American School Board Journal* report school law developments from the standpoint of a particular category of decisionmakers.[20] The monograph series isolates a particular legal problem and explores it in depth.[21] Reutter's 1982 work analyzes the impact of Supreme Court decisions on educational practice over time.[22] *West's Education Law Reporter* publishes articles and comments on selected cases in its bi-weekly issues.[23] While all these

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18. Plaintiffs in *Brown v. Board of Educ.*, 84 F.R.D. 383 (D. Kan. 1979) were successful in reopening the original case some 25 years after it was decided in 1954, even though they were not the original plaintiffs to the action. The court ruled that the original case had never been closed.

19. *See* Vol. 12, No. 3 WEST'S EDUC L. REP. X-XXV (Sept. 22, 1983) for a full explanation of this more comprehensive system of classification.

20. For principals, *e.g.*, W. St. John, *Documenting Your Case for Dismissal With Acceptable Evidence*, 67 NASSP BULL. 104 (Oct. 1983); for school board members, B. Sendor, *Don't Ask the Law to Shield You From Tax Credits*, 170 AM. SCHOOL BD. J. 25 (Oct. 1983).

21. M. McCARTHY, DISCRIMINATION IN PUBLIC EMPLOYMENT: THE EVOLVING LAW (NOLPE Monograph 1983).

22. E. REUTTER, JR., THE SUPREME COURT'S IMPACT ON PUBLIC EDUCATION (Phi Delta Kappa and NOLPE 1982).

23. In its first 45 bi-weekly issues dating back to November, 1981, some 60 widely ranging articles and comments on school law have been published. *See also* SPECIALTY LAW DIGEST: EDUCATION published monthly by the Bureau of National Affairs, Washington, D.C. which similarly focuses on target groups.

classification systems are helpful, they still leave the researcher with less than an all-inclusive scheme broad enough to encompass every educational-legal research study within its fold.

More than two dozen reports on the current status of the public schools have appeared within the past twelve months. While these are not strictly legal studies as defined here, they do represent national concern with America's continuing preeminence in commerce, industry, science and technology depending as it does on education.[24] Their legal implications must be reserved for later researchers.

A SYSTEM FOR CATEGORIZING RESEARCH

Inasmuch as the sources reporting legal/educational research are uncoordinated and widely scattered, the researcher can never be entirely certain that everything has been included. This chapter is a prime example: assurance is lacking that it is a comprehensive coverage of all the legal studies produced within the past 12—18 months. The ideal system would not only categorize educational law studies and other research as to content, but would also yield other information, such as the extent to which compliance has been achieved in practice. One dimension would be that of movement, of process over time, while the other would represent content, or substance, the substantive dimension. Furthermore, the system would be objective in nature and easily understood so that researchrs using it would reach similar findings. Finally, it would be flexible enough to allow for further developments in the law as they occur.

For purposes of discussion, imagine that the time element measurement mentioned above might form one axis of the grid.[25] This is the process by means of which minority law becomes in time majority law and national policy. The middle step is gradual acceptance ("legitimization") of the idea in the minds of those affected. It is the process used by the courts since 1954[26] and has become a recognized part of our social processes. There is evidence that it may become even more permanent than at first imagined.[27]

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24. The most notable of these reports was A NATION AT RISK published by the National Commission on Excellence in Education which aroused public sentiment toward improving schools as our first line of defense.

25. *See* note 12, *supra*.

26. Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

27. The acceptance by the Congress of the proposal to honor Dr. Martin Luther King's birthday the third Monday in January each year beginning in 1986 legitimizes non-violent protest as a part of the process by which a group's constitutional rights may be achieved over time. There is a moral dimension to justice and equality which permeates America's political action and causes Americans to do the right thing because it is the right thing to do. *See generally* G. Nicolosi, *The Second American Revolution*, 78 LIBERTY 15 (July-Aug. 1983) (the Republic needs its prophets of dissent and hope).

A caveat is necessary, however, in the use of the process side of the compliance grid. First, the categories do not represent calibrated segments of time over which change takes place. Second, some legal problems in education fail to reach Step 3, the legislative stage, or if they do, are subject to return to Step 1 for "re-cycling." Third, the middle step representing "legitimization" is imprecise, since it may vary with each different legal problem examined. Despite these limitations, the three-step process dimension can be useful in measuring the approximate compliance necessary for a particular problem in education.

A similar caveat is sounded for the content (substantive) dimension of the grid. Here the paradigm is that of the five major revolutions convulsing society in modern times (*see* Table 1). The history of mankind is

TABLE 1*

Major Revolutions Affecting American Education (and still in progress)

Name of Revolution*	Beginning Century	Freedom Sought	Current Holdover in Schools
Reformation	16th	Freedom from religious domination	Separation of church and state issues
American and French	18th	Freedom from political tyranny	Involvement of public employees in politics
Industrial	19th	Freedom from economic exploitation	Right to work and have security
Automation (Atomic Age)	20th	Freedom from labor's yoke	Impersonality of the urban school; education moving toward mechanization
Revolution of Rising Expectations (Civil Rights)	20th	Freedoms included in the Bill of Rights	Challenges to traditional ways of operating schools

* These *irresistible* social forces, once in motion, became more and more difficult to control or direct, so that mankind, while the beneficiary of freedoms won, nevertheless seemed less and less able to direct, control and manage the ultimate results of their driving force. It should be emphasized that the effects of these revolutions are not confined to education alone, but extend to every aspect of modern life. The result, as Archibald MacLeish has stated, is that Americans are *frustrated*, although nowhere else are people more affluent, more free, or more powerful in terms of the amounts of power available to each person within the nation.

Change, whether fast or slow, is *directional* in that it moves from the *status quo* toward uncharted depths not yet imagined. Thus, the law (which man uses to help him control and manage change) can be either an *anchor* or a *sail*. Frightened by the uncertainty of change, man turns to black magic or science in an effort to forecast the future, and lessen the impact of change. But even science lacks the comfort of predictability: since Hiroshima, mankind has come to realize that science regrettably lacks a conscience.

* From M. Chester Nolte, *Duties and Liabilities of School Administrators*, (1973) at 56.

the story of man's unequenchable thirst for freedom accompanied by a search for infallibility. Thus, Luther's Reformation was the search for religious freedom; an infallible pope was replaced by an infallible Bible. The American and French revolutions were attempts to obtain political freedom; an infallible king was replaed by an infallible document of rights. The Industrial Revolution in turn centered on economic freedom, the technological revolution was a struggle for freedom from the yoke of labor, while the more recent civil rights movement sought individual freedom for the disadvantaged. These great movements, still in progress, changed not only the schools but the entire society around the globe. The legal problems arising today can be categorized as either religious, political, economic, technological/urban, or civil in nature. The grid is helpful in obtaining an approximation of the extent to which these larger movements have run their course. To the extent that full freedom goals have been achieved in each of the movements, the grid will measure their status at any given point in time.

The following listings are not intended to be exhaustive, but merely illustrative of the kinds of actions and defenses that might be subsumed under each heading.

Religious

Home instruction • Tuition tax credits • Vaccination • Flag salute/national anthem • Prayers in school • Bible reading • A moment of silence • Creche/religious displays • Christmas programs • Censorship (where appropriate) • Use of schools by prayer groups • Display of Ten Commandments • *Lemon* test • Released/shared time programs • Religious holidays • Secular humanism • Textbook purchases • First Amendment

Political

Powers of local boards • Teachers/employees/first class citizens • Freedom of speech/press • Discriminatory practices • Right to vote/hold office/be politically active • Faculty evaluations • Administrative remedies • Nepotism • Due process/equal protection in exercising political rights • Rights of individual board members • Elections • Public relations • Sunshine laws/executive sessions • Ministerial actions of boards

Economic

Collective bargaining rights of employees • Unfair labor practices • Wages/hours/conditions of employment • Equal pay for equal work • Back pay/call back rights • Master agreement matters • Fact finding/mediation/arbitration • Seniority rights • Sovereign immunity of boards/districts • Teacher dismissal/re-employment • Insurance/finance/bonds/budgets/bidding • Contractual issues • Group use of school buildings • School construction

Technological

Teaching methodologies/curricula • Right to be onesself/dress/ appearance • Tracking/ability grouping • Age discrimination • Urban problems/attendance/exclusion • Impersonal relationships • Right to an education/to know/to be informed/to learn

Civil Rights

Alien/handicapped/disadvantaged • Civil Rights Acts/Section 1983 suits • Constitutional torts • Due process of law/equal protection • Busing/desegregation • Suspension/expulsion/corporal punishment • Board procedures vis-a-vis children/employees/others • Bill of Rights

It should be emphasized that none of these classifications is mutually exclusive; there is some overlapping. However, there is the possibility that by prior arrangement, a system could be agreed upon as to which category each type of legal problem or issue might fall. This would standardize the grid and make it easier to use by researchers seeking to determine the general status of any particular issue in school law. Researchers would be able to place an issue on the grid according to the extent to which that issue had become "settled, undisputable law," as postulated by the Supreme Court in *Wood v. Strickland*[28] and modified in *Harlow v. Fitzgerald*.[29] Thus, studies on how well an issue had become generally accepted could be conducted on a discipline-wide basis.

How reliable is the grid in showing progress toward full compliance? It is not intended as a precise categorical system since it is obvious that the axes are not ordinal, much less drawn to interval scale. Rather, the grid is intended as a broader view of categories of freedom cases than is presently available. It can be held in mind and become an operational "rule of thumb" paradigm useful to the researcher in classifying any particular legal issue in education at first glance.

Perhaps its most convenient usage would be to provide "cubby-holes" in which the legal researcher could temporarily file legal issues on the way to a more in-depth examination, moving them from one box to another as progress is noted. The grid is not intended to be a final, comprehensive pattern for analyses of educational law problems but is offered in the hope that it may prove useful to those who are confused by the endless flow of school law that comes along daily.[30]

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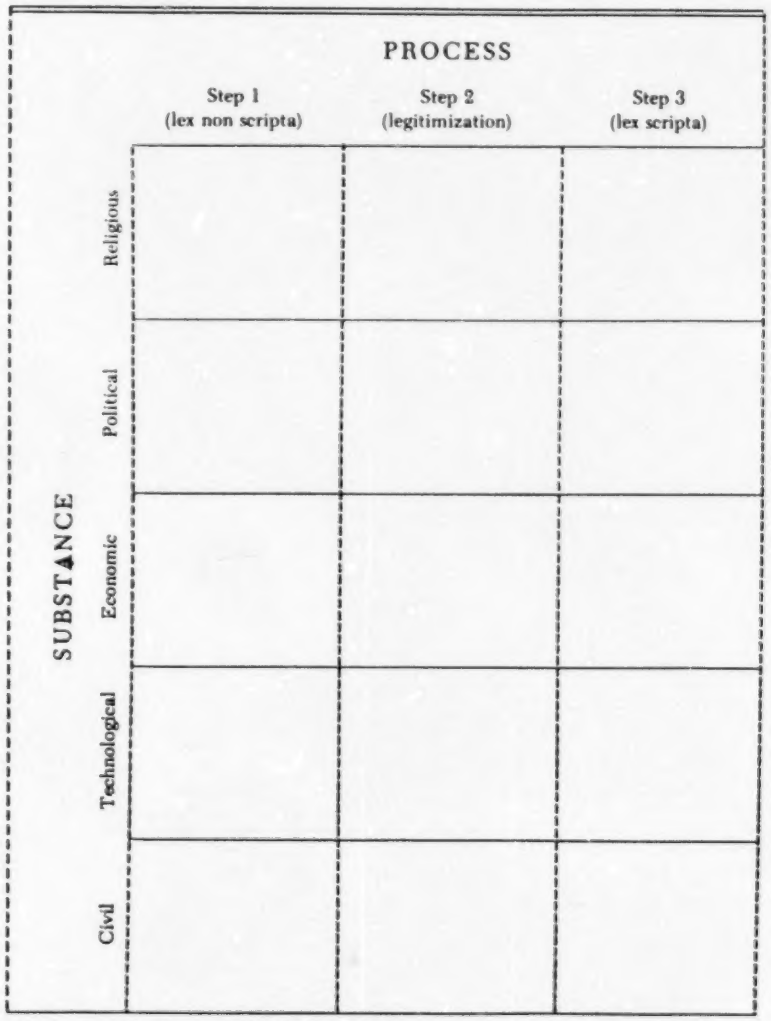
28. 420 U.S. 308 (1975).

29. 102 S. Ct. 2727 (1982). The decision eases the standard for determining school board members' liability under 42 U.S.C. § 1983 for alleged violation of constitutional rights. Henceforth, an official's good faith will be judged on a purely objective standard, *i.e.*, whether there is a violation of rights which were clearly established at the time the action occurs, or of "settled, indisputable law."

30. Judge Hand referred to the passing scene as "the flux that passes before him" upon which a man hopes sometimes in vain to impose some mark of himself even though he always must be "aware of the odds against him." *See* note 1, *supra*.

COMPLIANCE GRID



The horizontal axis represents the process by which a minority ruling of the courts progresses from minority to majority law while the vertical axis represents the five great revolutions still moving through the schools. The grid permits the researcher to plot the relative status of any legal question insofar as it represents "settled, indisputable" law outlined in *Wood v. Strickland*, 420 U.S. 308 (1975) and modified in *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982).

If it lacks something, Judge Hand's words come again to mind. "I know as well as you that it is not of the highest quality; but I did put into it whatever I had, and that was the game I started out to play."[31]

CONCLUSION

Pure research in school law is not possible, since the researcher must rely on inquiry that can be verified by experience and observation in the field. The studies produced in the past year tended to fall into classes: compliance, accountability, impact, cost-effectiveness, Supreme Court decisions, and the process by which minority law eventually becomes legitimized emerging as majority law in the form of national policy.

The studies leave much to be desired. Of uncertain quality, widely scattered in the literature, tending toward subjectivity at times, accepted on the reputation of the researcher, and ungoverned by a comprehensive categorization scheme, they are confusing even to those for whom they are written—the nation's educational decisionmakers.

A partial solution to this problem might be development of a broader system for categorizing educational legal issues over time. One dimension would be a three-step process by which minority rights are transformed into enabling law and become national policy, while the other dimension would consist of the five major revolutions affecting the schools in the modern era.

The grid would enable researchers to plot the progress of any particular legal issue over time from inception to its general acceptance as "settled, indisputable law."

31. *Id.*